GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

January 19, 1972

DEPARTMENT OF LAW OPINION NO. 72-3 (R-22)

REQUESTED BY: THE HONORABLE HELEN GRACE CARLSON
Arizona State Representative

QUESTIONS:

1. Is the varying requirement for hours of study between cosmetologists and barbers proper?

2. What is the constitutional status of A.R.S. § 32-357 (Sunday closing laws for barbers)?

3. What is the constitutional status of A.R.S. § 32-501.2(c), which limits cosmetologists to the cutting of hair of female patrons only?

ANSWERS:

1. Yes.

2. See body of opinion.

3. See body of opinion.

I.

It is within the discretion of the Legislature and of the respective Boards of Cosmetology and Barbering to determine how many hours of study are required to produce a qualified practitioner. Therefore, while cosmetology may require 1,800 hours and barbering only 1,500 hours, there is a reasonable basis for the distinction which makes it valid. All discrimination is not unconstitutional, but only that discrimination which is unreasonable in its nature. Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955); Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953). The practice of cosmetology differs considerably from the practice of barbering and involves, among other things, a greater knowledge of chemistry. This reason alone is sufficient to explain the variation between the two requirements.

II.

We are more concerned with the constitutionality of A.R.S. § 32-357, making it a criminal offense to practice barbering on Sunday. Our research indicates a split of opinion through the courts concerning such a provision. Cf. 20 A.L.R. 1111 and 98 A.L.R. 1088. The former majority view seems to have been that such closing laws were valid, as they related to the practice of barbering. However, more recent case law indicates that the constitutionality of such a provision is doubtful.

In the recent case of Rogers v. State, 199 A.2d 895 (Del. 1964), the Supreme Court of Delaware found a similar statute to be an arbitrary interference with private business, in violation of the Fourteenth Amendment. This well reasoned opinion cites several cases from jurisdictions upholding Sunday closing laws for barbers, but nevertheless concludes that such laws are improper.

The trend in more recent years is in the direction of the minority view, declaring such statutes unconstitutional in whole or in part. Cf. Dunbar v. Hoffman, 468 P.2d 742 (Colo. 1970). Considering the foregoing, this statute probably would not stand a constitutional challenge.

III.

Your final question concerns the validity of the provision contained in A.R.S. § 32-501.2(c) which limits the licensed cosmetologist to cutting hair of a woman or girl, as opposed to a male patron. We would hasten to point out that not all services rendered by a cosmetologist are limited to female customers. For example, A.R.S. § 32-501.2(b) would allow a cosmetologist to style, arrange, wave, tint or curl the hair "of the head of a person". Nevertheless, there is a clear prohibition against the use by cosmetologists of scissors, shears, clippers or other appliances upon the hair of a male patron.

The ultimate question is whether or not such a prohibiton is a valid one under the police power of the State. In other words, does the prohibition protect the public health, morals

or general welfare? The answer to this question is not a simple one, although this section appears subject to severe doubt under recent court decisions.

The Arizona State Board of Cosmetology conducted a survey concerning the respective rights of cosmetologists and barbers to cut the hair of patrons of both sexes. The result of that survey showed that, of the states answering, 29 allowed cosmetologists to cut men's hair, while 12 did not allow such activity. Additionally, barbers in 46 states were permitted to cut women's hair, including the State of Arizona. Such states as California, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Montana, New Jersy, Oregon, Pennsylvania and South Dakota permitted cosmetologists to cut men's hair. On the other hand, cosmetologists were not permitted to cut men's hair in such states as Alaska, Connecticut, Illinois, Indiana, Iowa, Michigan, Nevada, New Mexico, New York and Rhode Island. Rulings from the Attorney General in the states of Pennsylvania and Massachusetts eliminated the discrimination, while in New Jersey an appellate court decision had the same effect.

Neither the Arizona Civil Rights Act nor the United States Civil Rights Act (A.R.S. § 41-1441; 42 U.S.C., § 2000a) prohibits discrimination in accommodations on the basis of sex. A case discussing this question, Seidenberg v. McSorleys' Old Ale House, Inc., 317 F.Supp. 593 (1970), is considered infra.

The questionable constitutionality would likely stem from a violation of the Fourteenth Amendment, as well as sections of the Arizona Constitution guaranteeing due process and equal protection of the law (Article 2, §§ 4 and 13).

There are two possible approaches which might be employed to attack the constitutionality of this statute. The first is that it unreasonably discriminates against a cosmetologist, preventing him from serving a male patron, when a licensed barber performing acts of an identical nature is not so prohibited.

The second approach would be a challenge by the male patron whose freedom of choice (between the cosmetologist or barber) would be curtailed. Either of these would appear to be available to challenge the statute.

There is no violation of the equal protection clause of the Arizona Constitution or the United States Constitution if the statutes passed under the police power have some natural and reasonable basis and relationship to the objective to be accomplished. But such statutes cannot be discriminatory, capricious or unreasonable. Cf. State v. Double Seven Corporation, 70 Ariz. 287, 219 P.2d 776 (1950).

Further, a statute cannot discriminate between classes of persons by allowing one to engage in what is presumptively a legitimate business while denying this right to others, when such a denial is not based upon a principle which may reasonably promote public health, welfare or safety. Stewart v. Robertson, 45 Ariz. 143, 40 P.2d 979 (1935); State v. Also, 11 Ariz.App. 227, 463 P.2d 122 (1969).

To approach the alleged discrimination in a rational manner, the following must be considered:

A. The question of health or safety. The same principles of sanitation are involved when a cosmetologist cuts the hair of a female patron as would be involved if he served a male patron.

B. The question of moral welfare. Since a cosmetologist may be of either sex, it does not appear to be a reasonable discrimination against the male patron on the basis that he might add to an atmosphere contributing to the corruption of the female cosmetologist, since the male is already present as a fellow practitioner. On the other hand, it is the right of the male or female barber to cut the hair of either a male or female patron. The health and moral questions are identical, since both sexes are represented in one capacity or another in the barber shop.

Based on this reasoning, there seems no valid public purpose in discriminating against the male patron who desires to have his hair cut by a cosmetologist. Even the courts have recognized that both professions are of the same nature. Cf. State v. Sullivan, 71 N.W.2d 895 (1955). The United States Supreme Court has recently ruled in the case of Reed v. Reed, 93 Idaho 511, 465 P.2d 635, United States Supreme Court No. 70-4 (1971), that sex was not a valid basis for discrimination where all other qualifications were equal.

However, the most persuasive authority was the case of Seidenberg v. McSorleys' Ale House, Inc., supra. Briefly, the McSorleys' Ale House case involved a venerable 115 year practice of the bar to serve only male patrons. A challenge was brought on the basis of the United States Civil Rights Act. The court, however, determined that this section was not applicable and found a violation of the equal protection clause of the Fourteenth Amendment. The court stated that only irrational or arbitrary distinctions for classifications were forbidden by the Fourteenth Amendment. The court said:

> "* * * [S]ex-based discriminations have been nullified when no persuasive difference between women and men could be offered to justify the difference in treatment. . . .
>
> "In the case before us no difference between men and women, as potential customers of the defendant, has been offered as a rational basis for serving one and not the other. . . ." 317 F.Supp. at 605.

It would appear that, similarly, there is no real or rational basis for discrimination against the male patron who wishes to have his hair trimmed by a cosmetologist or against the cosmetologist who wishes to render this service. For these reasons, the statute in question would likely not stand a judicial test and be declared a denial of the equal protection of the law guaranteed by the Arizona Constitution and the Fourteenth Amendment to the United States Constitution.

By virtue of the recent New York case above cited and the rationale of this opinion, this office must point out the problem to this Legislature and suggest that the Legislature amend or repeal prior to any court action in this area.

Respectfully submitted,

Gary K Nelson
by F. S.

GARY K. NELSON
The Attorney General

GKN:DJR:ell